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Limitation of Actions--Section 16, Civil Practice Act--What Constitutes "United in Interest" (Prudential Insurance Co. v. Stone, 270 N.Y. 154 (1936))

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court from taking jurisdiction of the matter.[10] This conclusion would be contrary to the weight of authority, both of cases [11] and writers.[12]

The opinion does say that "the courts do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the commonweal." The court could have based its decision solely on this broader concept of public policy without attempting to reconcile it with the juridical definition.

Whether this reciprocal disability, which precludes a suit by one spouse against the other for personal injuries, would be promotive of the public welfare is a debatable question. Sound reasons have been given in support of both sides.[13]

In the instant case the court took the position that the rule of law exists by tradition and authority, that "rights may not be granted or withheld by our courts at the pleasure of the judges to suit the individual notion of expediency and fairness," and any changes must be addressed to the legislative, not the judicial branch of the government.

D. R.

LIMITATION OF ACTIONS—SECTION 16, CIVIL PRACTICE ACT—WHAT CONSTITUTES "UNITED IN INTEREST."—The plaintiff insurance company issued a life insurance policy to defendant's husband on June 13, 1930, defendant being named as beneficiary. The policy contained a one-year incontestability clause. On April 24, 1931, plaintiff brought this action to rescind the policy on the grounds of

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[10] (1931) 79 U. OF PA. L. REV. 635. "In all conflict of law cases it is obvious that there must be two conflicting rules of law, that of the foreign state and that of the forum. The rule of the foreign state is to be applied by the forum unless the public policy of the state of the forum is violated. But if the public policy of the state of the forum is conceived to be identical with its law there would never be occasion to resort to the law of the foreign state for by hypothesis the law of the foreign state is contrary to the law of the forum; it is therefore contrary to the public policy of the forum and the situation is that in which the forum will refuse to apply the foreign law."

[11] Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198 (1918) (court rejected the doctrine that in the absence of similarity of the foreign statute which created the cause of action and our own statute the action could not be maintained); see also Chicago & E. I. Ry. v. Rouse, 178 Ill. 132, 52 N. E. 951 (1899).

[12] GOODRICK, *Public Policy in the Law of Conflicts* (1930) 36 W. VA. L. Q. 156; BEACH, *Uniform Interstate Enforcement of Vested Rights* (1918) 27 YALE L. J. 656; BEALE, CONFLICT OF LAWS (1935) § 612. "Differences in law do not necessarily constitute a sufficient basis for a declaration that the rule of the foreign state is contrary to the strong public policy of the forum."

[13] Allen v. Allen, 246 N. Y. 571, 159 N. E. 656 (1927), Pound, J. (dissenting opinion); *Contra:* Longendyke v. Longendyke, 44 Barb. 366 (N. Y. 1863).

misrepresentations in the application as to his health, prior medical attention, hospitalization, and rejection of his application by another insurance company, naming defendant as a co-defendant with the insured. The defendant only was served. The insured died July 14, 1931. The insured had admittedly made certain material misrepresentations. Defendant urged that the Statute of Limitations was a complete bar to the action because the insured was not served with a summons. *Held,* service on the beneficiary was a valid commencement of the action against both the beneficiary and on the insured within the contestability period, under Civil Practice Act, Section 16, which provides that an action is commenced when service is made on defendant or a co-defendant united in interest with him.[1] *Prudential Insurance Co.* v. *Stone,* 270 N. Y. 154, 200 N. E. 679 (1936).

Whether the beneficiary is so united in interest with the insured that service of a summons on her within the contestability period would prevent the Statute of Limitations running against the action is the sole question to be considered. The pertinent Section [2] must be liberally construed.[3] Although in terms relating only to statutory limitations, it applies to limitations fixed by agreement.[4]

To be united in interest, the interest of the defendants in the subject matter must be such that they stand or fall together, and that judgment against one will similarly affect the other.[5]

The interests of a beneficiary and the insured under a life policy are inseparable because the avoidance of the policy destroys the beneficiary's rights in the policy in the same manner that the insured's rights thereunder are abrogated.[6] The beneficiary has a present legal interest in the contract [7] which as between her and the insurer is determined by the contract itself and not by the death of the insured,[8] even though the beneficiary could be changed by the

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[1] N. Y. Civ. Prac. Act § 16: "When Action Deemed to be commenced. An action is commenced against a defendant, within the meaning of this act which limits the time for commencing an action, when the summons is served on him or on a co-defendant who is a joint contractor or otherwise united in interest with him."

[2] *Ibid.*

[3] N. Y. Civ. Prac. Acts 2, 3.

[4] N. Y. Civ. Prac. Act § 10; Metropolitan Life Ins. Co. v. Di Novi, 139 Misc. 1, 247 N. Y. Supp. 578 (1931); N. Y. Life Ins. Co. v. Dickler, 135 Misc. 594, 238 N. Y. Supp. 684 (1929).

[5] Croker v. Williamson, 208 N. Y. 480, 484, 102 N. E. 588, 589 (1913) (Action to determine validity of a will and its probate. *Held,* all legatees were united in interest. The court said: "Their interests (referring to the various legatees) under the will must stand or fall together, and it would seem to be pretty clear that they are, therefore, united.")

[6] Brief for Respondent, p. 24, Prudential Ins. Co. v. Stone, 270 N. Y. 154, 200 N. E. 679 (1936).

[7] Barbin v. Moore, 85 N. H. 362, 159 Atl. 409 (1932).

[8] Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167, 44 Sup. Ct. 90 (1923); Monahan v. Metropolitan Life Ins. Co., 283 Ill. 136, 119 N. E. 68 (1918).

insured. If not brought in as a party defendant, any later contest against her may be barred by the contestability period in the contract.[9]

Co-makers of a note,[10] partners as to a firm note,[11] and insured and beneficiary of a life policy,[12] have been held united in interest, while connecting carriers in interstate commerce,[13] the owner of premises and a sub-contractor,[14] and the vendor and vendee in an executory contract for the sale of a lot [15] have been held not to be united in interest in cases where, one of the parties not having been served, the Statute of Limitations was interposed as a complete bar to the action.[16]

J. K.

PARENT AND CHILD — CUSTODY — RELIGION OF PARENT — HABEAS CORPUS.—Relator is the bedridden mother of a ten-year-old child, whose custody she seeks as against the father, with whom they both reside. The mother claims that the child is taken by the father to a religious sect,[1] of which he is a member, remote from their place of residence, thereby depriving her of her legal right to joint custody, and impairing the physical and moral well being of the child. The

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[9] Equitable Life Assurance Society v. Patterson, 1 Fed. 126 (D. Mass. 1880). In Shaw v. Cock, 78 N. Y. 194 (1879), where by order amending the summons a new party defendant was brought in, the court held that the suit was only commenced as to him when thus brought in and if between the time of the commencement of the action as to the original parties, and the time when the new defendant was brought in the period of limitation had expired, a plea of the statute in bar of his liability is good.

[10] Davison v. Budlong, 40 Hun 245 (N. Y. 1886).

[11] Howell v. Dimock, 15 App. Div. 102, 44 N. Y. Supp. 271 (2d Dept. 1897).

[12] Metropolitan Life Ins. Co. v. Di Novi, 139 Misc. 1, 247 N. Y. Supp. 578 (1931) (Summons served upon beneficiary within contestability period, held to be effective service upon the incompetent insured and the beneficiary).

[13] Germini v. Southern Pacific Co., 209 App. Div. 442, 204 N. Y. Supp. 603 (1st Dept. 1924).

[14] Martens v. O'Neill, 131 App. Div. 123, 115 N. Y. Supp. 260 (2d Dept. 1909).

[15] Moore v. McLaughlin, 11 App. Div. 477, 42 N. Y. Supp. 256 (3d Dept. 1896) (Action brought against both to foreclose a mechanic's lien on a building erected by the purchaser will not be deemed to have been commenced against the purchaser by service of the summons on his co-defendant.).

[16] 1 WAIT'S NEW YORK PRACTICE (3d ed. 1930) 88: If one of the parties united in interest in an action on a promissory note "was not served in the original action, a subsequent action under section 1185 of the Civil Practice Act to charge him as a joint debtor would not be a continuation of the former action but an entirely new action, and would be barred by the statute of limitations ten years after the former judgment was obtained."

[1] The Megiddo, of Christian persuasion, whose beliefs are not contrary to law.